

BOOKS

Global Business insolvency systems – a primer on what works and on what still needs to change

A Global View of Business Insolvency Systems

Jay Lawrence Westbrook, Charles D Booth,
Christopher G Paulus, and Harry Rajak
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In terms of an academic ‘all-star’ team in the insolvency world, the four authors of this work undoubtedly would each, on their own, merit serious consideration for inclusion in such a team. However, in sports, when ‘all stars’ are placed together it is not always clear that the sum is greater than the individual parts although, on the occasions that it does work, the results can be a joy to behold. With their work on *A Global View of Business Insolvency Systems*, Professors Westbrook, Booth, Paulus, and Rajak deliver a work that is incredibly comprehensive in scope and yet very easy to read and a book that measures up to the standards one would expect from such an exceptional grouping of academics.

The book’s introduction accurately describes what is to follow, a text that is intended to provide a coherent view of insolvency systems found around the world. From the standpoint of geographical coverage it is difficult

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for this reviewer to imagine which parts of the world have been omitted. Although it is quite understandable for there to be considerable focus on the US, the UK, the balance of the EU, and the other Commonwealth countries (uniquely, the UK fits into both the EU and Commonwealth categories); jurisdictions as diverse as Mexico, Japan, South Africa, Colombia, Indonesia,

and those of North Africa are touched upon in various areas (many more are mentioned, this is just a sample). This focus is understandable given that three of the four authors are, of course, based in either the US or the UK and the fourth, Professor Paulus, is based in Germany. More importantly the genesis of the modern concepts of business rescue are undoubtedly driven by developments in the approach to insolvency and business in both the US and the UK. Almost universally it is now recognised that there are times when greater value can be derived if an insolvent business can be restructured instead of being liquidated either in whole or partly.

For each topic that is addressed, the authors provide a rather exhaustive approach to the policy options that have been selected around the world in making legislative choices. Instead of prescribing a particular approach, the authors recognise that the selection of a particular response amongst various policy choices to a specific issue does not exist in a vacuum. Rather the choices that are made must be sensitive to local legal and business traditions.

As the authors themselves note, their goal in this work is to provide a coherent view of insolvency systems found around the world. The focus of the book is on the business debtor, not the consumer. The attempt to demonstrate the vital links between national insolvency systems and the overall legal system in which the particular national insolvency system operates is very apt. In terms of business rescues, the authors are quite perceptive in noting that a wonderfully written insolvency law in a country with a poorly developed legal system really is not of much benefit to anyone. However, a poorly developed insolvency law may be less of a hindrance in a country with a more sophisticated legal and business culture with a respected judicial system.

Three fundamental goals, according to the authors, drive insolvency laws:

- transparency;
- predictability; and
- efficiency.

It is difficult to argue, an insolvency system which works well will succeed in meeting all three categories such that participants (debtors, lenders, trade suppliers, employees, other stakeholders) will easily be able to understand what is happening at any given point in time. The system should be relatively simple and clear so that outcomes should be generally known and the system is efficient. Efficiency should logically follow from a system that is transparent and predictable, although that is not always the case (for example a country with an inefficient legal system might well be transparent and predictable but can take an

inordinate time to produce the correct result and is thus inefficient). That is not to say that countries must reach the same result for instance in treatment of certain claims. However, all stakeholders should have a good idea going in how their claim will be treated in a particular country should they resort to that nation's legal system to enforce their claims, and that the particular country's system will give effect on an efficient basis to that result.

After a brief introductory chapter, the seven substantive chapters provide a comprehensive overview of approaches to various insolvency issues on a global scale. At the outset the authors take the critical position that insolvency laws are not part of an exclusive system. Instead, the book first examines debt collection under various national laws outside of insolvency, for example through the enforcement of judgments or the granting of security in the debtor's assets. From there the authors first review traditional liquidation type provisions. In this area the book approaches the topic of liquidations in a sequential perspective, from the start of the process right through to the payment of any dividend to creditors.

The next part of the book addresses business restructurings (depending on the country this can be labelled, alternatively, as reorganisation, rehabilitation, rescue – all of them being synonyms for an attempt to save all, or parts, of an ongoing business). The authors first review restructurings from a formal, statutory perspective but then move on to devote a chapter to reviewing workouts from an informal, or out of court, perspective. This is a topic that many works do not address given that the out of court process is difficult to study empirically by its very nature. Yet, the reality is that a substantial number of workouts, if not the vast majority, do occur outside of any formal insolvency process. However, the authors do note that a legal culture with a transparent, predictable and efficient insolvency system will also likely be one where parties may well save time and expenses by working out an informal moratorium and/or restructuring as the parties are well aware of what will result within the specific country's national court system if there is a resort to a more formal judicial process.

Employee rights in an insolvency is the focus of a discrete chapter. Again the authors point out the unique role that employees can play in an insolvency proceeding, particularly in the context of some type of rescue regime. Employees are not just creditors. They can be integral to the survival of the business. Insolvency legislation worldwide seems to provide some type of protection for employee claims such that these claims rank, at least in part, ahead of many other types of claims although exactly where such claims rank in relation to secured claims varies

greatly between countries.

National institutions, courts, administrative officials, lawyers, accountants, turnaround professionals, within which and by whom national insolvency laws are administered, forms another valuable chapter in this work. In what might strike some as controversial, the authors begin the discussion in this area by noting that if they were forced to choose, '...we would opt for bad law and good personnel over good law and bad personnel.' This recognises that with integrity and respect for those involved one can often come up with ways to reorganise or save parts of a business even in the absence of a specific legal regime that provides expressly for such a result. On the other hand, an excellent insolvency law is virtually meaningless if it cannot be implemented with regard to the three underlying principles identified above. The emphasis here is on the vital part that judges and administrators perform and in particular their roles outside the insolvency system, in debt collection and enforcement of security. Here the authors highlight that learning about the qualities of these individuals can be more important than understanding a particular country's legal rules and procedures. Those who have experience around the globe dealing with numerous jurisdictions no doubt will agree with such a sentiment.

In the last chapter of the book, the authors provide a detailed overview of insolvency from a cross-border perspective. Specifically, they outline the ability of courts in one national system to recognise and assist with a proceeding commenced in another jurisdiction. Here the authors recognise the tension between national sovereignty and the ever increasing multinational scope of many businesses. Some countries maintain a strictly national approach to insolvency laws while others have increasingly recognised that it is in the national interest to be far more accommodating in recognising a foreign proceeding, although the extent of such recognition also varies hugely from country to country. Even various international rules, such as the EU's insolvency directive, while praised for bringing an international perspective to insolvency rules within the EU, are also criticised by the authors for in essence simply being territorial on a broader scale since such laws do not address recognition of insolvency proceedings outside of the EU so at that level one is forced back to looking at national laws for each member of the EU.

The extensive use of national examples highlights both congruence and differences in national approaches to each of the topics covered. Breadth of coverage at times does mean that the book sacrifices depth for a more superficial look at various issues. Presumably, someone wanting to look at a particular country's (or region's) approach to an issue would use

the book as a starting point for research. In addition, if there is a criticism to be offered it is that the book's strength (ie, breadth of coverage) is also its greatest weakness. In covering so many jurisdictions there is

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very little chance of keeping everything up to date.

As a Canadian lawyer this reviewer picked up on certain errors in describing the current state of the law in Canada. For example, in discussing unregistered security interests, the authors state that Ontario, like the various American states, does not require registration of personal property leases for terms that exceed one year – this provision was changed in Ontario several years ago to bring it in line with the provision in other Canadian provinces; there is a similar type of error where there is a description on wages and benefits and the general statement is that Canada is a jurisdiction where secured creditor rights take priority over employee claims but that employees take precedence over unsecured creditors. Such a general statement is no longer accurate in Canada where employees now have priority over secured creditors to a certain extent for wage arrears

in the context of an insolvency proceeding. While this reviewer is not familiar with the details of legislation in other jurisdictions, there is the likelihood that the specific information provided on various jurisdictions may no longer be current.

These errors do not, in any way, undercut the validity of the general approach that the authors have provided and the value to be gained from their efforts. This is just a caution to the reader that the book should not be cited as the sole source for any specific, current legislation in any of the countries surveyed. As the authors themselves note, insolvency laws are being rewritten over the entire globe. The book is excellent at shining a spotlight on the various approaches. It should be used as a starting point, not the endpoint, for research on the current approach used in any specific country.

Nevertheless, this book is a highly recommended addition to any person wanting a comprehensive, yet easy to read guide, on how different countries have applied different policy choices at the national level in the context of their insolvency legislation. The relative paucity of footnotes, but an extensive bibliography for further research, also make this book an excellent introduction to the topic without the feel of being weighted-down as a more dry academic work. As a practical work, this reviewer expects to be resorting to this work quite frequently.

Kenneth D Kraft
Heenan Blaikie LLP, Toronto
kkraft@heenan.ca

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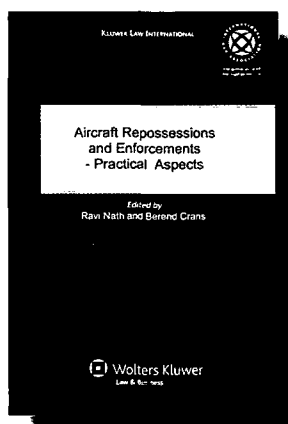
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Aircraft Repossession and Enforcement Practical Aspects

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